Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1995

THOMAS S. WALDRON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the failure to instruct the jury on the "materiality" element of a crime charged under 18 U.S.C. § 1014 reversible constitutional error under *United States v. Gaudin*, 515 U.S. ___, 63 U.S.L.W. 4611 (1995)?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Citations	iii
Opinion Below	1
Statement of Jurisdiction	1
Constitutional Provisions and Statute Involved	1
Statement of the Case and the Facts	4
A. The Procedural History, Charges, Conviction and Sentence	4
B. The Trial Court's Instructions to the Jury on "Materiality"	5
C. "Materiality" on Appeal	7
Reasons for Granting the Writ	10
I. The Petition Presents an Important but Unanswered Question of Federal Criminal and Constitutional Law.	10
II. Conflict With *Gaudin*	11
Conclusion	13

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Griffith v. Kentucky, 479 U.S. 314 (1987) 12

In re Winship, 397 U.S. 358 (1970) 8

Porat v. United States, 63 U.S.L.W. 3905 (1995) 12

United States v. Gaudin, 28 F.3d 943 (9th Cir. 1994) 7, 8, 9

United States v. Gaudin, 515 U.S. __, 63 U.S.L.W. 4611 (1995) .....i, 8, 9, 10, 11, 12

United States v. Waldron, 53 F.3d 680 (5th Cir. 1995) 1, 5, 9

United States v. Williams, 12 F.3d 452 (5th Cir. 1994) ...6, 10, 11

Statutes Cited:

18 U.S.C. § 1001 .....9, 10, 12

18 U.S.C. § 1006 4

18 U.S.C. § 1014 .....i, 2, 4, 5, 10, 11, 12

18 U.S.C. § 1344 4

18 U.S.C. § 1623 12

Contents

Page

28 U.S.C. § 1254(1) 1

United States Constitution Cited:

Fifth Amendment 1

Sixth Amendment 2

APPENDIX

Appendix A — Opinion of the United States Court of Appeals, Fifth Circuit May 18, 1995 ..... 1a

Appendix B — Excerpts from Waldron's Initial Brief in the United States Court of Appeals for the Fifth Circuit ... 8a

Appendix C — Excerpts from Waldron's Reply Brief in the United States Court of Appeals for the Fifth Circuit ... 14a

Appendix D — Waldron's Notice of Supplemental Authority (5th Circuit) 16a

OPINION BELOW

The opinion and judgment of the Fifth Circuit Court of Appeals, entered on May 18, 1995, is reported at 53 F.3d 680 (5th Cir. 1995). The opinion is reprinted in the Appendix at 1a-7a.

STATEMENT OF JURISDICTION

The judgment and opinion of the Fifth Circuit, affirming a judgment of conviction and sentence of the United States District Court for the Middle District of Louisiana, was entered on May 18, 1995. App. 7a. No rehearing was sought. This petition for certiorari is being filed within 90 days of the May 18, 1995 opinion and judgment. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Constitutional Provisions

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without

> due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Statutory Provision

Title 18 U.S.C. § 1014 provides:

> Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Reconstruction Finance Corporation, Farm Credit Administration, Federal Crop Insurance Corporation or a company the corporation reinsures, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers Home Administration, the Rural Development

Administration, any Farm Credit Bank, production credit association, agricultural credit association, bank for cooperatives, or any division, officer, or employee thereof, or of any regional agricultural credit corporation established pursuant to law, or of the National Agricultural Credit Corporation, a Federal land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, any Federal home loan bank, the Federal Housing Finance Board, the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, the Farm Credit System Insurance Corporation, or the National Credit Union Administration Board, a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978), or an organization operating under section 25 or section 25(a) of the Federal Reserve Act, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

STATEMENT OF THE CASE AND THE FACTS

A. The Procedural History, Charges, Conviction and Sentence

Petitioner Thomas S. Waldron is a Florida real estate developer who was charged with Title 18 U.S.C. § 1344 bank fraud, aiding and abetting a false entry into bank records (18 U.S.C. § 1006) and eight counts of making false statements to a federally insured Louisiana bank under Title 18 U.S.C. § 1014.

At his October, 1993 trial in Baton Rouge, Louisiana, Waldron was acquitted on all but six § 1014 false statement counts. The false statements arose from identical non-disclosures on three loan applications and three related borrower's affidavits. Those documents contained representations that no litigation or governmental proceedings adversely affected the property for which loans were sought, and that the land was "not subject to any lien, security interest or other encumbrance except the first mortgage on Parcel A described in the mortgage title binder." App. 3a n. 3.

The criminal prosecution was based on the existence of a contract for sale and purchase, two deeds, and certain environmental proceedings which were extant at the time of the signing of the loan documents. One of Waldron's defenses was that the contract and deeds were contingent upon a never-executed Land Trust Agreement, therefore they were not liens, security interests or other encumbrances, and not material. The environmental litigation was settled for $5,000 and Waldron contended it was not material and that the non-disclosure was caused by his lawyer. His lawyer testified:

> I blame myself for this .... [H]ere I'm closing a loan, with the loan agreement

> dealing specifically with pending litigation and it doesn't get in the loan agreement. It's very embarrassing.

(R11-218).

Waldron's conviction on the false statement counts resulted in "two consecutive 18-month terms of imprisonment on two counts, [a fine of] $2,000,000.00, and . . . five years probation following his release." 53 F.3d at 682; App. 4a. Applications for bond pending appeal were denied by the district court, and by the court of appeals. Waldron is incarcerated in federal prison camp in Atlanta. He is eligible for halfway house release on November 21, 1995 and is scheduled for release March 25, 1996. An application for release pending certiorari review has been filed contemporaneously with this Petition.

B. The Trial Court's Instructions to the Jury on "Materiality"

The trial court instructed Waldron's jury on the elements of § 1014:

> Now, this section, section 1014, makes it a crime for anyone knowingly to make a false statement to a federally insured bank or savings and loan or other financial institution for the purpose of influencing the bank on an application for a loan.
>
> For you to find the defendant guilty of the crime alleged in counts 3 through 10, you must be convinced that the government has proved beyond a reasonable doubt, each of the following:

> First, that the defendant made or caused to be made a false statement to Sun Belt;
>
> Second, that the defendant made the statement knowingly;
>
> Third, that the Defendant did so for the purpose of influencing the bank on an application for a loan; and
>
> Fourth, *that the statement was false as to what we call a material fact.*

R13-261-262 (emphasis supplied).

Those instructions comported with the governing Fifth Circuit law:

> To sustain a conviction under this statute, *the government must prove that:* (1) the defendant made a false statement to a financial institution; (2) the defendant knew the statement was false when he made it; (3) he made it for the purpose of influencing the financial institution's action; and (4) *the statement was false as to a material fact.*

United States v. Williams, 12 F.3d 452, 456 (5th Cir. 1994) (footnote omitted) (emphasis supplied). *Williams* reiterated the then-accepted (*i.e.*, pre-*Gaudin*) notion that "[m]ateriality is a legal determination made by the district court," and that "[a] false statement is material if it is shown to be capable of influencing a decision of the institution to which it was made." *Id.* at 456 (footnote omitted).

The trial court told the jury that it should not consider the fourth element of the crime — "materiality":

> Now this question of material statement *is not* a question for you to decide. This is a question of law for the Court to decide. *I have decided that question,* and you are hereby instructed that the *statements alleged to be false* in counts 3 through 10 *are all material statements.*
>
> Now, while I have found under the law that each of the statements was material, that is capable of influencing Sun Belt in acting on the loan, you must decide whether the defendant knowingly caused false statements to be made for the purpose of influencing the bank on an application for a loan.

R13-263-264 (emphasis supplied).[1]

C. "Materiality" on Appeal

On appeal, Waldron explicitly and repeatedly raised the "materiality is for the jury" issue as it had been expressed in the Ninth Circuit's decision in *United States v. Gaudin,* 28 F.3d 943 (9th Cir. 1994) (*en banc*). One issue presented in the "Statement of the Issues" in Waldron's Fifth Circuit Brief was:

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1. Waldron's trial counsel objected to the jury being told the statements were material: "It being a matter for the court, under Fifth Circuit law, we think it, the jury, should not properly be instructed as to the matter at all." (R13-272, 273). Given the controlling law in the circuit, a *Gaudin*-like objection would have been futile.

DOES *IN RE WINSHIP*, 397 U.S. 358 (1970), AS APPLIED IN *UNITED STATES V. GAUDIN*, ___ F.3d ___ (9TH CIR. 1994) REQUIRE THAT "MATERIALITY" OF A FALSE STATEMENT BE DECIDED BY A JURY, NOT THE COURT?

See App. 9a (excerpts of Waldron's Initial Brief in the Fifth Circuit).

The Brief's "Statement Regarding Oral Argument" cited several reasons for argument, including "the constitutionality under *In re Winship* [397 U.S. 358 (1970)] of a court, not a jury, determining 'materiality,' an essential element of a false statement case." App. 9a. Waldron's Brief presented the *Gaudin* materiality issue under the heading "A Challenge to Established Dogma — Materiality Was for the Jury, Not the Court." App. 12a. Waldron's Brief asserted "*in toto* the [Ninth Circuit] *Gaudin* majority holding" (App. 13a), acknowledging Judge Kozinski's "tsunami" dissent in that court (28 F.3d 953) and concluding, "should *Gaudin's* 'tsunami' survive [in the Supreme Court] or persuade [the Fifth Circuit], Waldron's conviction must be reversed." App. 13a. Waldron's Reply Brief noted the continuing viability of the *Gaudin* issue and the fact that the Government had sought certiorari review in *Gaudin*. App. 14a-15a.

Waldron's appeal was argued in the Fifth Circuit on January 5, 1995, the day before this Court granted certiorari in *Gaudin*. 115 S. Ct. 713 (1995). Undersigned counsel reminded the Fifth Circuit panel of the pendency of the *Gaudin* certiorari petition, and after certiorari was granted, brought that fact to the Fifth Circuit's attention.

After *Gaudin* was argued, Waldron filed as supplemental authority portions of the Government's Supreme Court Brief on

the Merits in *Gaudin*, and a transcript of the April 17, 1995 oral argument.[2]

On May 18, 1995, the Fifth Circuit affirmed Waldron's conviction. App. 1a-7a. Among other legal conclusions, the court wrote: "Even assuming the 1982 Contract for Sale and Purchase of two warranty deeds were contingent upon the unexecuted and Trust Agreement, we find that their existence *was material* to whether Sun Belt would risk extending the three $1,000,000.00 loans." 53 F.3d at 683; App. 5a (emphasis supplied). The decision never mentioned the "materiality is for the jury" issue, or *Gaudin*. It said only:

> Our review of Waldron's remaining issues on appeal reveals no reversible error on the part of the district court. Therefore, we find that Waldron's remaining claims have no merit.

53 F.3d at 684; App. 7a.

Thirty-two days later this Court decided *Gaudin*, and held unanimously that in a Title 18 U.S.C. § 1001 case (false statement to a department or agency of the United States) the Fifth and Sixth Amendments to the Constitution require the element of materiality to be determined by a jury, not a court. 515 U.S. ___; 63 U.S.L.W. at 4615.

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2. In *Gaudin*, the Government sought to distinguish 18 U.S.C. § 1001 from other false statement statutes, arguing that "materiality" was properly a question of law in § 1001 (where the operations of the government agency were a matter of law), but that in other statutes involving false statements to a private entity materiality was a matter of fact. *See* Petitioner's Reply Brief in *United States v. Gaudin*, No. 94-514, pp. 5-8. *See also* App. 17a-18a n. 1. Although this Court's decision in *Gaudin* did not rest on that distinction, the Government's logic adds force to the argument in favor of granting certiorari in this case, which involves alleged false statements to a private, federally insured, bank.

Petitioner Thomas Waldron seeks certiorari to review the decision below which concluded that there was "no merit" to his claim that under § 1014 the element of materiality was for the jury, not the judge. That conclusion presents two reasons for granting certiorari.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION PRESENTS AN IMPORTANT BUT UNANSWERED QUESTION OF FEDERAL CRIMINAL AND CONSTITUTIONAL LAW

This case presents an important but answered question: Does a defendant charged with a violation of Title 18 U.S.C. § 1014 (making a material false statement to a federally insured bank) have a constitutional right to have a jury determine, beyond a reasonable doubt, his guilt on the element of materiality? "Materiality" is an essential element of the offense created by § 1014. *United States v. Williams,* 12 F.3d 452, 456 (5th Cir. 1994).

United States v. Gaudin, 515 U.S.__, 63 U.S.L.W. 4611 (June 19, 1995) held that in a prosecution brought pursuant to 18 U.S.C. § 1001 (making a material false statement to a department or agency of the government), a "trial judge's refusal to allow the jury to pass on the 'materiality' of Gaudin's false statements infringed" the defendant's right to have "a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged." *Id.* at 4615. On its face, *Gaudin* addresses only § 1001, but the rationale is applicable to § 1014, which contains an identical "materiality" element.

Section 1014 requires, like § 1001, "that the statements be 'material' to the . . . inquiry, and that 'materiality' is an element

of the offense that the government must prove," and that "the definition of 'materiality' [is that] the statement must have a 'natural tendency to influence or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed." *Gaudin*, 515 U.S. __, 63 U.S.L.W. at 4612 (citation omitted); *see also United States v. Williams*, 12 F.3d 452, 456 (5th Cir. 1994) (§ 1014). Therefore the answer in a § 1014 case should be the same as the answer provided by *Gaudin:* the Constitution requires that a jury decide materiality.

This case provides the opportunity to answer the important question of whether *Gaudin* requires that a § 1014 defendant be accorded the same right as Gaudin, to have the jury determine materiality — an essential element of the government's proof.

II.

CONFLICT WITH *GAUDIN*

The court of appeals decision affirming Waldron's conviction did not address the "materiality" / *Gaudin* issue, although Waldron raised the Ninth Circuit's *Gaudin* opinion in his Fifth Circuit Initial Brief (App. 8a-13a). In addition, Waldron noted this Court's grant of certiorari in his Reply Brief (App. 15a) and shortly after the April 17, 1995 *Gaudin* oral argument provided the court of appeals with a transcript of the argument. *See* discussion *supra* at 8-9.

The silence of the decision below on the *Gaudin* issue does not minimize the decision's conflict with *Gaudin*. Having been squarely presented with the *Gaudin* issue, the court of appeals should have addressed it, or at the least, awaited the outcome in *Gaudin* before deciding the Waldron appeal. The decision below simply concluded that the issues raised by Waldron, which the opinion did not discuss, had "no merit." App. 7a. Waldron

properly raises the *Gaudin* issue in this Petition for Certiorari, and because his conviction has not achieved "finality" under *Griffith v. Kentucky*, 479 U.S. 314 (1987), Waldron is entitled to receive the benefit of *Gaudin*. *Id.* at 321 n.6.

The decision below conflicts with *Gaudin* because this Court's analysis of the constitutional error in failing to instruct the jury on an essential element of the crime under § 1001 is equally applicable to § 1014. Certiorari should be granted and plenary review accorded Waldron's claim that *Gaudin* applies to a § 1014 case. At the least, because the court of appeals did not have the benefit of this Court's *Gaudin* decision when its opinion was written, certiorari should be granted and the decision below vacated with a remand to the court below to determine whether materiality should have been decided by the jury in this § 1014 case, and whether Waldron's convictions should be reversed. *See Porat v. United States*, 63 U.S.L.W. 3905 (1995) (vacating a Third Circuit decision holding that "materiality" could be determined as a matter of law in a prosecution under 18 U.S.C. § 1623 — false statement to a grand jury — granting certiorari, and remanding for consideration in light of *Gaudin*).

CONCLUSION

For the foregoing reasons certiorari should be granted and this case should be accepted for plenary review. In the alternative, certiorari should be granted and the decision below vacated and remanded for consideration in light of this Court's decision in *Gaudin*.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT MAY 18, 1995

United States Court of Appeals,
Fifth Circuit.

No. 94-30083.

May 18, 1995.

UNITED STATES of America,

Plaintiff-Appellee,

v.

Thomas S. WALDRON,

Defendant-Appellant.

Before REAVLEY, DUHE and PARKER, Circuit Judges.

ROBERT M. PARKER, Circuit Judge:

Thomas S. Waldron ("Waldron") appeals his conviction and sentence on six counts of making a false statement on loan documents to a bank in violation of 18 U.S.C. § 1014. We affirm.

FACTS AND PROCEDURAL HISTORY

In 1981, Waldron, a real estate developer in Florida, purchased property near West Palm Beach for $1,850,000.00 through his corporation Marpalm Ranch and Farm, Inc. ("Marpalm"). When Waldron began experiencing financial

problems, he asked two business associates, Larry Reger ("Reger") and Harry Williams ("Williams"), if they wanted to buy into the venture and assume the mortgage payments on the property.

On March 9, 1982, Waldron signed a Contract for Sale and Purchase, which was an agreement between Richard Harris ("Harris"), Reger and Williams's attorney acting as trustee, and Marpalm to sell the property. The contract contained an arrangement for a closing in escrow. On that same day, Waldron also executed a warranty deed to the trustee and a warranty deed with the grantee left blank. The contract gave the purchaser sole discretion to decide which of the two warranty deeds would be recorded. The contract also disclosed four pending disputes over environmental issues affecting the property.[1]

At closing, Waldron's documents were delivered to Harris's law firm, as escrow agent, to remain in escrow until April 1, 1992. Waldron received nearly $132,000.00 to compensate Marpalm for interest it had paid on the note. Sometime after the closing in 1982, Harris prepared an unsigned Land Trust Agreement, which was referred to in the warranty deed to the trustee.

In 1985, Waldron was introduced to Wendell Shelton ("Shelton"), the Chairman of the Board of Sun Belt Federal Bank ("Sun Belt"), a federally insured savings bank. Originally,

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1. Those issues were as follows: (1) a claim asserted by South Florida Water Management District; (2) a claim from the Florida Department of Environmental Regulation; (3) a claim from the United States Department of the Army; and (4) matters set forth in a final order issued by the Assistant Secretary of the State of Florida Department of Environmental Regulation.

Shelton proposed a $3,000,000.00 loan to Waldron based upon a mortgage of the Marpalm property. Shelton falsified Board minutes to obtain a commitment letter without the approval of the Board of Directors.[2] However, the loan negotiations broke down at closing because the structure of the loan violated usury laws. Shelton and Waldron then agreed that Sun Belt would make three separate $1,000,000.00 loans to three corporations created by Waldron. Waldron installed three nominees in the three newly formed corporations to sign the applicable Sun Belt loan documents. Neither the nominees nor Sun Belt was told of the existence of the 1982 Contract for Sale and Purchase, the two warranty deeds, or the pending environmental proceedings.

On three successive Fridays in May 1985, each nominee signed a loan agreement and two affidavits.[3] When Harris found out about the Sun Belt loans involving the Marpalm property, he notified Clarence Rautenstrauch ("Rautenstrauch"), a representative employee of Reger. Rautenstrauch instructed Harris to record the deed.

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2. In a separate proceeding, Shelton pleaded guilty to charges arising out of that conduct. Waldron was charged as an accomplice, but was acquitted.

3. Each loan agreement contained representations that:

No litigation or governmental proceeding is pending or threatened against or affecting Borrower or the Land which may result in any material adverse change in Borrower's business, operations or the title to the Land or prevent or alter the use of the Land for any purposes;

(and)

The Land is not subject to any lien, security interest or other encumbrance except the first mortgage on Parcel A described in the mortgage title binder.

Appendix A

On June 27, 1985, Harris sent a letter to Waldron informing Waldron of his clients' concern over the Sun Belt loans. Then on July 1, 1985, Harris notified Sun Belt by letter of his clients' intentions to record their 1982 warranty deed. On July 10, 1985, Harris filed the warranty deed to the trustee. Based upon Harris's actions in filing the deed, Sun Belt stopped funding the loans.

Waldron was indicted by a grand jury on February 4, 1993. The indictment charged one count of bank fraud and aiding and abetting, one count of aiding and abetting false entry into bank records, and eight counts of false statements and aiding and abetting. At the conclusion of a jury trial in October 1993, Waldron was acquitted on bank fraud, false entry, and two counts of making false statements. He was convicted on the remaining six counts of making false statements. The district court denied a post-trial motion for judgment of acquittal and a new trial on February 2, 1994. On that same date, Waldron was sentenced to two consecutive 18-month terms of imprisonment on two counts, fined $2,000,000.00, and placed on five years probation following his release. His sentence was suspended on the remaining counts.

ANALYSIS

Disclosure of a Valid Claim or Interest

Waldron contends that his statements on the Sun Belt loan documents were true because under Florida law, neither Harris nor his clients had any valid claims or interests, recorded or unrecorded, in the Marpalm property. He argues that the language of the unsigned Land Trust Agreement left no doubt that the conveyance of the property was tied to execution of that agreement. Therefore, the 1982 Contract for Sale and Purchase

and the two warranty deeds, in absence of the execution of the Land Trust Agreement, did not constitute a claim, encumbrance, or adverse interest.[4]

We will reverse the district court's denial of a motion for judgment of acquittal only if no rational finder of fact could have found sufficient evidence, whether direct or circumstantial, to support a conviction, with all reasonable inferences drawn in the light most favorable to the verdict. *United States v. Faulkner*, 17 F.3d 745, 768 (5th Cir.), __ U.S. __, 115 S.Ct. 193, 130 L.Ed.2d 125 (1994).[5]

Even assuming the 1982 Contract for Sale and Purchase and two warranty deeds were contingent upon the unexecuted Land Trust Agreement, we find that their existence was material to whether Sun Belt would risk extending the three $1,000,000.00 loans. The 1982 Contract for Sale and Purchase specifically states that conveyance of title shall be by "recordable Warranty

4. Waldron's argument that a literally true answer is not a criminally false statement relies heavily on *United States v. Chapman*, 7 F.3d 66 (5th Cir. 1993), cert. denied, __ U.S. __, 114 S. Ct. 2713, 129 L. Ed. 2d 839 (1994). In *Chapman*, the defendant appealed a conviction of making false statements in connection with the acquisition of firearms. While he was appealing another criminal conviction, the defendant purchased a pistol, answering that he was not a "convicted felon" on the ATF forms. This Court reversed in part on the ground that under Texas law, the defendant was not a "convicted felon" during the pendency of his appeal. The Court concluded, therefore, that the defendant's statement was actually true. We find, however, that *Chapman* does not control in this case because the existence of the 1982 contract and two warranty deeds had an effect on the Sun Belt loans.

5. To sustain a conviction under 18 U.S.C. § 1014, the Government must prove that defendant knowingly and willfully made a false statement to a financial institution for the purpose of influencing the financial institution's action. *See United States v. Bowman*, 783 F.2d 1192, 1197-98 (5th Cir. 1986).

Deed" and that "[p]ossession of the premises shall be delivered on April 1, 1982." It also states that at closing in escrow, "seller shall execute any and all . . . documents reasonably required to be executed in connection with the transfer of title to the property." The contract makes no mention of the Land Trust Agreement, which was never executed, but specifically gives the purchaser the discretion of filing either warranty deed. Once Harris became aware of the Sun Belt loans and notified his clients, he was instructed to and filed the warranty deed to the trustee. Therefore, the jury could reasonably find the contract and warranty deeds constituted a claim, encumbrance, or adverse interest in the Marpalm property that Waldron was required to reveal to Sun Belt.

Disclosure of Environmental Proceedings

Waldron contends that no reasonable jury could conclude that he knowingly made a false statement with regard to the ongoing environmental proceedings because the Government failed to present any evidence that Waldron knew that the loan statements prepared by his attorney, George Bailey, would omit the information.[6]

Our review of the record reveals that Waldron was present at the Sun Belt loan proceedings, giving him the opportunity to read the loan applications and discover the omitted information. In addition, in reviewing the loan documents, Waldron would have read the representation, which was in all three loan agreements, that "no litigation or governmental proceeding [was] pending." Therefore, we find a reasonable jury could have inferred that he had knowledge that the ongoing environmental proceedings were

6. Waldron did disclose the environmental litigation to Harris and his clients in the 1982 Contract for Sale and Purchase.

omitted from the loan documents and failed to disclose that omission to Sun Belt.

Opinion Testimony and Exclusion of Documentary Evidence

Waldron contends that the district court erroneously allowed Harris to testify as to his legal opinion on the ultimate fact in this case (whether, in light of the contract and deeds, Waldron's answers were false), and that the court did not cure the error by instruction because the judge failed to tell the jury to disregard Harris's testimony. Waldron also argues that the court abused its discretion when it admitted an unsigned, undated copy of the Land Trust Agreement that was central to his defense and then eliminated it the very next day.

Our review of the record reveals that Harris did not testify as to the ultimate issue of whether Waldron knowingly made false statements. Even if his testimony was erroneously admitted, the district judge cured the error by instructing the jury that Harris was not the judge of the law; the judge was. As for the court's admittance and subsequent exclusion of the unexecuted Land Trust Agreement, again, we find no abuse of discretion in light of the court's explanation and instruction given to the jury for his decision to exclude the evidence at a later time.

Our review of Waldron's remaining issues on appeal reveals no reversible error on the part of the district court. Therefore, we find that Waldron's remaining claims have no merit.

CONCLUSION

For the reasons articulated above, Waldron's conviction and sentence are AFFIRMED.

APPENDIX B — EXCERPTS FROM WALDRON'S INITIAL BRIEF IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 94-30083

District Court Docket No. 93-14A

UNITED STATES OF AMERICA,

Appellee,

vs.

THOMAS S. WALDRON,

Appellant.

On Appeal from the United States District Court for the Middle District of Louisiana

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Appendix B

* * * *

STATEMENT REGARDING ORAL ARGUMENT

The substantial issues in this case involve the nuances of Florida real estate trust law; evidentiary rulings which permitted admittedly improper government testimony to be heard by the jury, and which excluded critical defense evidence; a *Mesarosh v. United States* issue caused by a false document unwittingly introduced by the government; the sufficiency of the evidence for an 18 U.S.C. § 1014 conviction (false statements to a bank); and the constitutionality under *In re Winship* of a court, not a jury, determining "materiality," an essential element of a false statement case. Oral argument will assist the Court's resolution of the issues presented.

* * * *

STATEMENT OF THE ISSUES (continued)

* * * *

VI.

DOES *IN RE WINSHIP*, 397 U.S. 358 (1970), AS APPLIED IN *UNITED STATES V. GAUDIN*, ___ F.3d ___ (9TH CIR. 1994) REQUIRE THAT 'MATERIALITY' OF A FALSE STATEMENT BE DECIDED BY A JURY, NOT THE COURT?

* * * *

Appendix B

[Initial Brief pp. 42-46:]

* * * *

B. THE CONSTITUTIONAL ERROR; THE ELEMENTS AND THE INSTRUCTION

The elements of an 18 U.S.C. § 1014 case are easily stated:

> To sustain a conviction under this statute, the government must prove that: (1) the defendant made a false statement to a financial institution; (2) the defendant knew the statement was false when he made it; (3) he made it for the purpose of influencing the financial institution's action; and (4) the statement was false as to a material fact.

United States v. Williams, 12 F.3d 452, 456 (5th Cir. 1994) (footnote omitted).

Judge Parker's instructions paralleled the elements:

> Now, this section, section 1014, makes it a crime for anyone knowingly to make a false statement to a federally insured bank or savings and loan or other financial institution for the purpose of influencing the bank on an application for a loan.
>
> For you to find the defendant guilty of the crime alleged in counts 3 through 10, you must be convinced that the government has proved beyond a reasonable doubt, each of the following:

Appendix B

> First, that the defendant made or caused to be made a false statement to Sun Belt;
>
> Second, that the defendant made the statement knowingly;
>
> Third, that the Defendant did so for the purpose of influencing the bank on an application for a loan; and
>
> Fourth, that the statement was false as to what we call a material fact.

(R13-261-262).

Williams reiterates the accepted notion that "[m]ateriality is a legal determination made by the district court," and that "[a] false statement is material if it is shown to be capable of influencing a decision of the institution to which it was made." *Id.* at 456 (footnote omitted). Judge Parker's instruction echoed that principle:

> Now this question of material statement *is not* a question for you to decide. This is a question of law for the Court to decide. *I have decided that question,* and you are hereby instructed that the *statements alleged to be false* in counts 3 through 10 *are all material statements.*
>
> Now, while I have found under the law that each of the statements was material, that is capable of influencing Sun Belt in acting on

> the loan, you must decide whether the defendant knowingly caused false statements to be made for the purpose of influencing the bank on an application for a loan.

R13-263-264 (emphasis supplied).

C. A CHALLENGE TO ESTABLISHED DOGMA — MATERIALITY WAS FOR THE JURY, NOT THE COURT

An *en banc* majority of the Ninth Circuit has recently raised a constitutional flag on the materiality matter of law mantra:

> [W]hen the judge rules that a false statement is material, and withdraws the element of materiality from the jury, the judge deprives the jury of its fact-finding duty and violates the defendant's Due Process and Sixth Amendment rights.

United States v. Gaudin, __ F.3d __, 1994 WL 271930, *8 (9th Cir. June 21, 1994). Relying on the *In re Winship*, 397 U.S. 358, 365 (1970) promise that the "Due Process clause protects the accused against conviction except upon proof [to a proper fact finder] beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged" (*Gaudin* at *9), the Ninth Circuit acknowledged that it had broken new ground and old shackles in 18 U.S.C. § 1001 cases (the charge in *Gaudin*) and in all other crimes carrying a materiality element. *Id.* at *6.[11]

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11. Judge Posner presaged *Gaudin* in *United States v. Staniforth*, 971 F.2d 1355 (7th Cir. 1992) where, in a § 1014 case, he wrote:

(Cont'd)

Appendix B

Appellant Waldron asserts *in toto* the *Gaudin* majority holding, including its "plain error" and harmful error analysis. *Id.* at *8-*10.[12] We recognize the change in law *Gaudin* portends, and the possibility that the *Gaudin* dissent may prevail in the Supreme Court: "What more can one possibly say except that the maverick spirit is alive and well here in the West?" *Id.* at *11 (Kozinski, J., dissenting). But our law, unlike the law of the Medes and the Persians, is mutable. (Cf. *Hurtado v. California,* 110 U.S. 516, 528-529, 4 S.Ct. 111, 117-118 (1884)). *Gaudin's* and Judge Posner's view is correct. Should *Gaudin's* "tsunami" (*id.* at *10) survive or persuade this Court, Waldron's conviction must be reversed.

* * * *

(Cont'd)

> The cases also hold that materiality is a question of law, and hence to be decided by the judge. . . . This is more than a little puzzling. A criminal defendant is entitled to require the prosecutor to prove to the jury's satisfaction every element of the offense. . . . But the question of whether a false statement to a bank or other business firm is capable of influencing the firm's decisions is no more a question of law than whether a false statement to a prospective investor is capable of influencing his decision to invest and therefore is material to that decision.

971 F.2d at 1357-58. Ultimately the court decided it "need not attempt to resolve today the interesting issue of whether materiality in a prosecution under section 1014 is a question of fact or a question of law." *Id.* at 1358.

12. Waldron's counsel did not precisely raise this issue at trial. He assumed materiality was for the court but objected to the prejudice of telling the jury the consequences of materiality, i.e., that the bank would be influenced. (R13-273).

APPENDIX C — EXCERPTS FROM WALDRON'S REPLY BRIEF IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 94-30083

District Court Docket No. 93-14A

UNITED STATES OF AMERICA,

Appellee,

vs.

THOMAS S. WALDRON,

Appellant.

On Appeal from the United States District Court for the Middle District of Louisiana

APPELLANT'S REPLY BRIEF

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Appendix C

* * * *

[Reply Brief p.14 n.3] The materiality issue — for the court or the jury — is a point of dispute because of Waldron's adoption of the recent Ninth Circuit decision, *United States v. Gaudin*, 28 F.3d 943 (9th Cir. 1994), *petition for cert. filed*, No. 94-514. The government properly cites the governing law of this Circuit on the subject. (Brief for the United States, p. 45).

* * * *

APPENDIX D — WALDRON'S NOTICE OF SUPPLEMENTAL AUTHORITY (5TH CIRCUIT)

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May 8, 1995

Clerk
United States Court of Appeals
for the Fifth Circuit
600 Camp St. Room 102
New Orleans, LA 70130

Re: United States v. Waldron, No. 94-30083
(argued and awaiting decision)
Notice of Supplemental Authority

Dear Sir or Madam,

Pursuant to Rule 28(j), Fed.R.App.P., Appellant Thomas Waldron, through undersigned counsel, submits the attached supplemental authorities for the Court's consideration:

1. Government Reply Brief in *United States v. Gaudin*, No. 94-514, pending in the Supreme Court of the United States (*see* pp. 6-9,11);

2. Transcript of Oral Argument in *Gaudin* (*see* pp. 4, 19).

Following the oral argument in this case on January 5, 1995, the government's petition for a writ of certiorari in *United States*

v. Gaudin, 28 F.3d 943 (9th Cir. 1994) (*en banc*) was granted; the case was argued before the Supreme Court of the United States (No. 94- 514) April 17, 1995. Appellant Waldron's Initial Brief raised *Gaudin* in Point IV(C), p. 44, and argued that the *en banc* decision of the Ninth Circuit Court of Appeals (holding that in an 18 U.S.C. § 1001 case it was plain error under *Winship* for the court to decide the element of "materiality" and to not submit it to the jury) is correct and requires reversal of Waldron's convictions under 18 U.S.C. § 1014. When certiorari was granted in *Gaudin*, Waldron sought bond pending appeal pending the outcome in *Gaudin*, but that motion was denied by this Court.

The government argued in *Gaudin* that because § 1001 involves a false statement to a governmental agency with statutory duties, the element of materiality should be decided by the court as a matter of law (Government Reply Brief No. 94-514), while *acknowledging* that where the false statement is made to a private agency the element of materiality is properly decided by the jury as a matter of fact. *Id.* at 6-9, 11. *See also*, Transcript of Oral Argument in *Gaudin*, pp. 4, 19.[1] That newly-articulated

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1. The relevant colloquy at p. 4 is:

> QUESTION: But Mr. Dreeben [Assistant Solicitor General], you recognize that in the case of material misrepresentations to a private party, for example in the securities area, that those are regarded as questions for the jury, the materiality of a misrepresentation, say, in a proxy statement.
>
> MR. DREEBEN: We do concede that.
>
> QUESTION: So how — what is the distinction? Do you just say, whenever it's to a Government agency it's

(Cont'd)

government position is pertinent to Waldron's appeal, because he was convicted under 18 U.S.C. § 1014 for making a false statement to a private entity — a bank.

The accompanying supplemental materials are submitted to apprise this Court that the government's ultimate argument in *Gaudin* may be decisive in this case.

Respectfully submitted,

/s/ —
BRUCE S. ROGOW
BEVERLY A. POHL
Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Supplemental Authority has been furnished to IAN F. HIPWELL, AUSA, and RANDALL B. MILLER, AUSA, United States District Courthouse, 339 Florida Street, Sixth Floor, Baton Rouge, Louisiana 70801, by *U.S. Mail* this *8th* day of *May,* 1995.

/s/
BRUCE ROGOW

(Cont'd)

for the judge, and whenever it's to a nongovernmental entity it's for the jury, and what's the rhyme or reason?

MR. DREEBEN: Well, I think that the line that history has drawn is between the materiality of false statements to private parties and the materiality of the false statements to Government bodies, and we accept that line as one that has enough basis in reason to survive the question of whether it violates the Due Process Clause of the Fifth Amendment.